

## Federal Acquisition Regulation

11.503

proceed by a certain day, the contracting officer may use the clause with its Alternate I.

[48 FR 42159, Sept. 19, 1983, as amended at 56 FR 41732, Aug. 22, 1991. Redesignated and amended at 60 FR 48241, Sept. 18, 1995]

### Subpart 11.5—Liquidated Damages

SOURCE: 48 FR 42159, Sept. 19, 1983, unless otherwise noted. Redesignated at 60 FR 48241, Sept. 18, 1995.

#### 11.501 General.

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction.

[48 FR 42159, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

#### 11.502 Policy.

(a) Liquidated damages clauses should be used only when both (1) the time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. In deciding whether to include a liquidated damage clause in a contract, the contracting officer should consider the probable effect on such matters as pricing, competition, and the costs and difficulties of contract administration.

(b) The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable. The contract may also include an overall maximum dollar amount or period of time, or both, during which liquidated damages may be assessed, to ensure that the result is not an unreasonable assessment of liquidated damages.

(c) The contracting officer shall take all reasonable steps to mitigate liquidated damages. If a liquidated damages clause is included in a contract

and a basis for termination for default exists, the contracting officer should take appropriate action expeditiously to obtain performance by the contractor or to terminate the contract (see subpart 49.4). If delivery or performance is desired after termination for default, efforts must be made to obtain the delivery or performance elsewhere within a reasonable time. Efficient administration of contracts containing a liquidated damages clause is imperative to prevent undue loss to defaulting contractors and to protect the interests of the Government.

(d) If a contract provides for liquidated damages for delay, the Comptroller General, on the recommendation of the head of the agency concerned, is authorized and empowered by law to make a remission, that in the discretion of the Comptroller General is just and equitable, of the whole or any part of such damages.

#### 11.503 Procedures.

(a) If a liquidated damages clause is to be used in a contract, the applicable clause and appropriate rate(s) of liquidated damages shall be included in the solicitation.

(b) If a liquidated damages clause is used in a construction contract, the rate(s) of liquidated damages to be assessed against the contractor should be for each day of delay and the rate(s) should as a minimum cover the estimated cost of inspection and superintendence for each day of delay in completion. Whenever the Government will suffer other specific losses due to the failure of the contractor to complete the work on time, the rate(s) should also include an amount for these items. Examples of specific losses are—

- (1) The cost of substitute facilities;
- (2) The rental of buildings and/or equipment; or
- (3) The continued payment of quarters allowances.

(c) If appropriate to reflect the probable damages, considering that the Government can terminate for default or take other appropriate action, the rate of assessment of liquidated damages may be in two or more increments which provide a declining rate of assessment as the delinquency continues.